No. 15-109

IN THE

Supreme Court of the United States

JERMAINE SIMMONS, *et al.*,

Petitioners,

v.

WALTER J. HIMMELREICH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

CHRISTIAN G. VERGONIS
Counsel of Record
YAAKOV M. ROTH
DAVID T. RAIMER
JORDAN VON BOKERN
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
cvergonis@jonesday.com

Counsel for Respondent

QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") provides that, for certain enumerated categories of claims, the Act's "provisions"—including its jurisdictional grant to the district courts, 28 U.S.C. § 1346(b)—"shall not apply." 28 U.S.C. § 2680. One of those provisions states that a "judgment" entered in an action "under section 1346(b)" "bar[s]" an action against federal employees by reason of the same subject matter. *Id.* § 2676.

If a tort claim against the Government is dismissed for lack of subject-matter jurisdiction because it falls within the scope of § 2680:

(i) does the dismissal trigger the § 2676 judgment bar, even though § 2676 does "not apply" to claims encompassed by § 2680;

(ii) is the dismissed action "under section 1346(b)," even though that jurisdictional grant likewise does "not apply" to claims encompassed by § 2680; and

(iii) is the dismissal a "judgment" that "bar[s]" an action against the employee, even though the dismissal otherwise lacks any claim-preclusive effect?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT 1

A. Statutory Background 2

B. Respondent's Injuries And Subsequent Efforts To Obtain Relief 5

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. UNDER THE PLAIN TEXT OF 28 U.S.C. § 2680, THE JUDGMENT BAR DOES "NOT APPLY" TO CLAIMS EXEMPTED FROM THE ACT 11

A. The Judgment Bar Does "Not Apply" To Claims Falling Within § 2680, And So Dismissals Under That Section Do Not Trigger The Judgment Bar 12

B. Petitioners Offer No Coherent, Plausible Alternative Construction Of The Text 17

II. SECTION 2676 ALSO MAKES CLEAR THAT SECTION 2680 DISMISSALS DO NOT TRIGGER THE JUDGMENT BAR 30

A. Jurisdictional Dismissals Do Not Count As Judgments In Actions "Under" The FTCA's Jurisdictional Provision 31

B. Jurisdictional Dismissals Are Not "Judgments" Under Section 2676 37

C. Section 2680 Dismissals Do Not Trigger The Judgment Bar Since They Rest On Defenses Personal To The Government 51

III. PETITIONERS' EXPANSIVE READING OF THE JUDGMENT BAR WOULD LEAD TO ABSURD RESULTS 53

CONCLUSION 55

TABLE OF AUTHORITIES

Page(s)

CASES

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 16

Anderson v. Yungkau, 329 U.S. 482 (1947) 12

Annapolis Urban Renewal Auth. v. Interlink, Inc., 405 A.2d 313 (Md. Ct. Spec. App. 1979) 49

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 32

Ardestani v. INS, 502 U.S. 129 (1991) 33

Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947) 28

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 13

Beaver v. Bridwell,
598 F. Supp. 90 (D. Md. 1984) 49

Beneficial Nat'l Bank v. Anderson,
539 U.S. 1 (2003) 34, 35

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971) ..... *passim*

Bolduc v. United States,
402 F.3d 50 (1st Cir. 2005) 32

Brewer v. Sheco Constr. Co.,
327 F. Supp. 1017 (W.D. Ky. 1971) 25, 28

Burdette v. Carrier Corp.,
71 Cal. Rptr. 3d 185 (Ct. App. 2008) 52

Carlson v. Green, 446 U.S. 14 (1980) 55

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 34

Cheney R.R. Co. v. R.R. Ret. Bd.,
50 F.3d 1071 (D.C. Cir. 1995) 20

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140 (1988) 45, 46

Collins v. United States,
564 F.3d 833 (7th Cir. 2009) 32

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 13

Dalehite v. United States,
346 U.S. 15 (1953) 2, 3, 15, 32

Davric Me. Corp. v. U.S. Postal Serv.,
238 F.3d 58 (1st Cir. 2001) 27

De Scala v. Panama Canal Co.,
222 F. Supp. 931 (S.D.N.Y. 1963) 26

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 33, 39

FDIC v. Meyer, 510 U.S. 471 (1994) ....*passim*

Five Flags Pipe Line Co. v. Dep't of Transp.,
854 F.2d 1438 (D.C. Cir. 1988) 20

Flores v. Edinburg Consol. Indep. Sch. Dist.,
741 F.2d 773 (5th Cir. 1984) 49

Fourco Glass Co. v. Transmirra Prods. Corp.,
353 U.S. 222 (1957) 20

Gardner v. Panama R.R. Co.,
342 U.S. 29 (1951) 25, 26

Gilmer v. Porterfield, 212 S.E.2d 842 (Ga. 1975) 42

Griffin v. Bozeman, 173 So. 857 (Ala. 1937) 52

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995) 2, 54

Hallock v. Bonner, 387 F.3d 147 (2d Cir. 2004) 33

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 29

Herring v. Tex. Dep't of Corrs.,
500 S.W.2d 718 (Tex. Civ. App. 1973) 49

Himmelreich v. United States,
No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010) 6

House v. Mullen, 89 U.S. 42 (1875) 16

Hughes v. United States, 71 U.S. 232 (1866) 44

Hui v. Castaneda, 559 U.S. 799 (2010) 4

Jones v. Valisi, 18 A.2d 179 (Vt. 1941) 42

Kontrick v. Ryan, 540 U.S. 443 (2004) 32

Kutzik v. Young, 730 F.2d 149 (4th Cir. 1984) 49

Lamie v. United States Tr., 540 U.S. 526 (2004) 17

Levin v. United States, 133 S. Ct. 1224 (2013) ... 14, 29

Lober v. Moore, 417 F.2d 714 (D.C. Cir. 1969) 52

Lockhart v. United States, 546 U.S. 142 (2005) 22

Loeffler v. Frank, 486 U.S. 549 (1988) 24, 27, 36

Mayor v. Cooper, 73 U.S. 247 (1867) 44

McVeigh v. McGurren,
117 F.2d 672 (7th Cir. 1940) 42

Migra v. Warren City Sch. Dist. Bd. of Ed.,
465 U.S. 75 (1984) 50

Montana v. United States, 440 U.S. 147 (1979) 33

Myers' Admn'x v. Brown,
61 S.W.2d 1052 (Ky. Ct. App. 1933) 41

North Carolina ex rel. Cooper v. TVA,
515 F.3d 344 (4th Cir. 2008) 26

Okla. Gas & Elec. Co. v. Okla. Packing Co.,
292 U.S. 386 (1934) 34, 35

Queen v. TVA, 689 F.2d 80 (6th Cir. 1982) 26, 28

Reves v. Ernst & Young, 494 U.S. 56 (1990) 22

Roadway Express, Inc. v. McBroom,
6 S.E.2d 460 (Ga. Ct. App. 1939) 41

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 13

Rose v. Town of Harwich,
778 F.2d 77 (1st Cir. 1985) 48

Russello v. United States, 464 U.S. 16 (1983) 35

Semtek Int'l Inc. v. Lockheed Martin Corp.,
531 U.S. 497 (2001) 47, 48

Stephan v. United States, 319 U.S. 423 (1943) 19

Sterrett v. Milk River Prod. Credit Ass'n,
647 F. Supp. 299 (D. Mont. 1986) 26

Swift v. McPherson, 232 U.S. 51 (1914) 44

Taylor v. Sturgell, 553 U.S. 880 (2008) 40

Tighe v. Skillings, 9 N.E.2d 532 (Mass. 1937) 52

Tooke v. Miles City Prod. Credit Ass'n,
763 P.2d 1111 (Mont. 1988) 26

United States v. Gilman,
347 U.S. 507 (1954) 2, 4, 39, 54

United States v. Muniz, 374 U.S. 150 (1963) 3

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 13, 14

United States v. Smith, 499 U.S. 160 (1991) ..... *passim*

United States v. Welden, 377 U.S. 95 (1964) 20

United States v. Wong, 135 S. Ct. 1625 (2015) 32

Wayne v. TVA, 730 F.2d 392 (5th Cir. 1984) 26

Westfall v. Erwin, 484 U.S. 292 (1988) 14

Whitehurst v. Elks, 192 S.E. 850 (N.C. 1937) 52

Will v. Hallock, 546 U.S. 345 (2006) 13, 14, 40

Williams v. United States, 50 F.3d 299 (4th Cir. 1995) 49

Wolf v. Kenyon, 273 N.Y.S. 170 (App. Div. 1934) 42

Yates v. United States, 135 S. Ct. 1074 (2015) 40

STATUTES AND RULES

28 U.S.C. § 1331 34

28 U.S.C. § 1915 7

28 U.S.C. § 2283 45

39 U.S.C. § 409(c) 28

Ch. 646, 62 Stat. 869 (1948) 21

Ch. 340, 63 Stat. 444 (1949) 25

Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) 19, 23

28 U.S.C. § 2679(b) ..... *passim*

28 U.S.C. § 2679(d) 21, 22

Federal Tort Claims Act, ch. 753, tit. IV,
60 Stat. 812, 842-47 (1946) 2, 18, 28, 29
28 U.S.C. § 1346(b) ..... *passim*
28 U.S.C. § 2672 ..... *passim*
28 U.S.C. § 2673 ..... 2, 12
28 U.S.C. § 2674 ..... 2, 12, 39
28 U.S.C. § 2675 ..... 2, 12
28 U.S.C. § 2676 ..... *passim*
28 U.S.C. § 2678 ..... 2, 12
28 U.S.C. § 2679(a) ..... *passim*
28 U.S.C. § 2680 ..... *passim*

Prison Litigation Reform Act,
42 U.S.C. § 1997e 7

Fed. R. Civ. P. 12 ..... 6, 32

Fed. R. Civ. P. 54 37

LEGISLATIVE MATERIALS

92 Cong. Rec. 6563 (1946) 25

H.R. 5373, 77th Cong. (1941) 43

H.R. Rep. No. 79-1287 (1945) 24

H.R. Rep. No. 81-830 (1949) 25

S. Rep. No. 77-1196 (1942) 39, 43

S. Rep. No. 79-1400 (1946) 24

Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary, 77th Cong. 9 (1942) 15, 27, 29, 43

OTHER AUTHORITIES

Black's Law Dictionary (3d ed. 1933) 37

Abraham Clark Freeman, *A Treatise on the Law of Judgments* (Edward W. Tuttle ed., 5th ed. 1925) 38

Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* (2015) 33, 54

Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947) 33, 44

Reginald Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167 (1952) 54

James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417 (2011) 43

Restatement of Judgments (1942) 41, 44, 51, 53

Restatement (Second) of Judgments (1982) 44, 52

Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341 (1949) 43

STATEMENT

Petitioners are officers at a federal prison where Respondent Walter Himmelreich served part of a sentence for production of child pornography. He filed this action against them (and others) under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they violated his Eighth Amendment rights by allowing another inmate, who threatened to "smash" a pedophile if released from segregated confinement, to nonetheless return to the general prison population. Just hours later, the inmate kept his word and violently assaulted Himmelreich, causing serious injuries. In an earlier appeal, a unanimous Sixth Circuit panel held that Himmelreich stated a viable *Bivens* claim based on Petitioners' deliberately indifferent failure to protect him from a "substantial risk of serious harm." Pet.App.29a-31a.

Petitioners now contend, however, that this action is precluded as a threshold matter, based on the dismissal for lack of subject-matter jurisdiction of a negligence claim Himmelreich had previously filed against the United States. Urging a dramatically broader construction of the FTCA's judgment bar than any Court of Appeals has adopted in the seventy years since Congress enacted it, Petitioners argue that because a court found that Himmelreich could not sue *the Government* for this harm, he is also precluded from suing the *responsible employees personally*. The Sixth Circuit correctly rejected that expansive view, which cannot be squared with either the statutory text or its purpose.

A. Statutory Background.

Before Congress enacted the FTCA, a person injured by a federal employee could either sue that employee personally under state tort law, or pursue a private congressional bill for compensation. But personal-capacity tort suits represented "a very real attack upon the morale of the services." *United States v. Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting legislative history). And private bills were a distraction for Congress and "notoriously clumsy." *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953).

Congress therefore enacted the FTCA—Title IV of the Legislative Reorganization Act of 1946—to provide a new remedy for those injured by employees acting within the scope of federal employment. Ch. 753, tit. IV, 60 Stat. 812, 842-47 (codified as amended at 28 U.S.C. §§ 1346(b), 2671-80). The Act created an "easy and simple" remedy against the United States, which conditionally agreed to subject itself to state tort law and "assume the obligation to pay damages for the misfeasance of [its] employees." *Dalehite*, 346 U.S. at 24; *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("Generally, [FTCA] cases unfold much as cases do against other employers who concede *respondeat superior* liability."). The Act waives sovereign immunity, subject to enumerated exceptions, where a private person would face tort liability in the state where the wrongful act occurred. This case turns on the relationships among three FTCA provisions.

First, the statute's jurisdictional provision, 28 U.S.C. § 1346(b), simultaneously functions as the cause of action and waiver of sovereign immunity. It confers subject-matter jurisdiction on district courts,

"[s]ubject to" the FTCA's other provisions, over claims:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Second, the Act includes a provision setting forth a series of claims that are *not* cognizable. "Congress qualified [§ 1346(b)'s] general waiver of immunity in 28 U.S.C. § 2680 by excepting from the Act claims arising from certain government activity." *United States v. Muniz*, 374 U.S. 150, 153 (1963). Section 2680 renders the FTCA, as a whole, inapplicable to certain categories of conduct; in the Code's language, the "provisions of this chapter and section 1346(b) of this title shall not apply to" a host of specified claims. The exceptions include claims based on exercise of a "discretionary function," 28 U.S.C. § 2680(a); claims arising from "negligent transmission" of mail, *id.* § 2680(b); claims alleging certain intentional torts, *id.* § 2680(h); and ten other categories of claims. Because these claims are excepted from, among other things, the Act's waiver of sovereign immunity and its jurisdictional grant in § 1346(b), courts have generally agreed with the Government's long-held position that the § 2680 carve-outs are jurisdictional in nature. *See Dalehite*, 346 U.S. at 24; Pet.Br.4-5 & n.1. Nothing in § 2680, however, precludes assertion of these claims against federal employees personally.

Third, the FTCA contains a so-called "judgment bar," which is the provision directly at issue here. The judgment bar is codified at 28 U.S.C. § 2676; it provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." In an early decision, this Court explained that this provision "makes a judgment against the United States a bar to action against the employee," thereby preventing any double recovery (*i.e.*, from the Government *and* the individual employee). *Gilman*, 347 U.S. at 511 n.2 (citing legislative history that, once "the Government has satisfied a claim ... that should, in our judgment, be the end of it").

In addition to these three original components of the FTCA, a more recent statutory amendment bears mention. In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, which among other things makes the FTCA the "exclusive" remedy for any injury arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Thus, claims against federal employees in their individual capacities are now expressly "precluded," even absent any prior FTCA judgment. *Id.* However, Congress carved out constitutional claims, *i.e.*, those under *Bivens*, from that exclusive-remedy provision. *Id.* § 2679(b)(2)(A); *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting this exception).

B. Respondent's Injuries And Subsequent Efforts To Obtain Relief.

1. At the time of the events at issue here, Respondent Himmelreich was incarcerated in federal prison in Ohio, serving a sentence for production of child pornography. JA.105. On October 16, 2008, another inmate, who was then being housed in the prison's Special Housing Unit as the result of a disciplinary violation, told prison officials that he was "not able to live with pedophiles" and that if he were released back to the general compound, he "will smash a pedophile." JA.119. Four days later, prison officials nonetheless released that inmate back to the general prison population. *Id.* As promised, just hours later, this inmate approached Himmelreich, "punched him in the face and then kicked him numerous times." *Id.* Himmelreich suffered serious injuries as a result of this assault and battery.

2. In February 2009, Himmelreich filed an administrative tort claim with the Federal Bureau of Prisons, recounting how he was "severely beaten" by the other inmate, suffering "internal bruising," "external injuries," "permanent ringing in the ears," persistent headaches, and "a pinched nerve." JA.98. In August 2009, the Bureau's regional counsel denied the claim, on the basis that there was "no evidence to suggest your assailant ever told staff he was going to assault you or that staff had any prior knowledge you were going to be assaulted." JA.93. That was false. As the Government's declarant later admitted, the assailant had told prison officials of his intent to "smash" a pedophile just days before he carried out that threat. JA.106, JA.119.

Following the Bureau's rejection, Himmelreich filed, in February 2010, a one-sentence complaint against the United States, styled as an "appeal" of the denial of his "administrative tort claim." JA.91. The civil cover sheet identified the case as a general "civil rights" matter and did not cite the FTCA. Dkt. 1-2, *Himmelreich v. United States*, No. 4:10-cv-307 (N.D. Ohio Feb. 11, 2010).

The Government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that the court "lack[ed] subject matter jurisdiction ..., because Plaintiff's claims fall within the discretionary function exception to the [FTCA]," 28 U.S.C. § 2680(a). JA.102. Its brief emphasized that, "[b]ecause Congress has not waived the sovereign immunity of the United States for claims that fall within the discretionary function exception, federal courts lack subject matter jurisdiction over such claims." JA.108; *see also* JA.105 (arguing that court "lacks subject matter jurisdiction"); JA.115 (same). In the Government's view, Himmelreich's claim fell within the FTCA's discretionary-function exception on the theory that prison officials exercise discretion and judgment when they house and protect inmates.

On November 18, 2010, the district court granted the motion to dismiss, agreeing that it "lacks subject matter jurisdiction over acts falling within the discretionary function exception" to the FTCA, and concluding that Himmelreich's claim fell within that statutory carve-out. Pet.App.47a, 49a-53a, 55a.

3. In October 2010—after the Government moved to dismiss Himmelreich's initial action, but before the court granted that motion—Himmelreich filed a separate, second action in the same court.

This second complaint was styled as a "complaint under *Bivens*"; it alleged, in relevant part, that the named defendants, including Petitioners in their personal capacities, knew about the intended assault and had violated Himmelreich's Eighth Amendment rights by failing to protect him. JA.41.

The district court initially dismissed this action *sua sponte* under 28 U.S.C. § 1915(e). Pet.App.34a, 38a. As to the Eighth Amendment claim, the court reasoned that Himmelreich had not alleged that the officials "acted with a sufficiently culpable state of mind." *Id.* 41a-44a. On appeal, however, the Sixth Circuit vacated and remanded in relevant part. *Id.* 23a-24a. It explained that Himmelreich alleged sufficient facts to show that the officers were aware of a "substantial risk" to Himmelreich or to a "class of prisoners" including him, and had "disregarded that risk by releasing [the other inmate] back into the general population." *Id.* 30a-31a.

On remand, however, the district court again dismissed the Eighth Amendment claim, this time on summary judgment. Pet.App.13a. The court first found Himmelreich's claims barred by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), for failure to exhaust administrative remedies within the Bureau of Prisons. Pet.App.16a-20a. The court also held that the FTCA judgment bar precluded the Eighth Amendment claim. Because that claim arose from the same assault and failure to protect as Himmelreich's earlier tort suit against the United States, which was dismissed "because the actions in controversy fell under the discretionary[-function] exception to the FTCA," the court concluded that § 2676 "bars any further action." Pet.App.21a.

4. Himmelreich appealed, JA.32, and the Sixth Circuit again vacated and remanded. Pet.App.1a-2a.

As to exhaustion, the panel invoked the exception for when an official's threats to retaliate make internal remedies "functionally unavailable." Pet.App.3a-4a. Because Himmelreich alleged that one defendant had placed him in administrative detention for filing his tort claim and threatened to transfer him if he continued to file grievances, a jury could fairly find that Himmelreich was "improperly prevented" from exhausting. Pet.App.4a.

Turning to the FTCA judgment bar, the panel reasoned that "dismissal for lack of subject-matter jurisdiction does not trigger" the bar. Pet.App.6a. "Put bluntly," the panel said, if a court lacks subject-matter jurisdiction, it cannot enter judgment "on the merits" and must dismiss the action; that is not a "judgment" within the meaning of § 2676. *Id.* (quoting 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3713 (3d ed. 1998)). And, as neither of the parties disputed, "courts lack subject-matter jurisdiction over an FTCA claim when the discretionary-function exception applies, as it did here." *Id.* 6a-7a. Hence the earlier dismissal of Himmelreich's tort claim against the Government did not trigger the judgment bar. *Id.*

5. Petitioners sought rehearing en banc, but no judge called for a response. Pet.App.11a.

SUMMARY OF ARGUMENT

Section 2676 requires injured plaintiffs to choose a defendant: the Government in *respondeat superior*, or the responsible employee personally. At the end of the day, there is only one injury, and there should be only one full and fair opportunity to seek redress. Accordingly, if the plaintiff litigates to "judgment" an action against the United States "under" the FTCA, that should ordinarily be the end of the matter.

The question here, however, is what happens if *there is no remedy* against the United States, because Congress has carved a category of claim out of the FTCA altogether, through the exceptions that § 2680 enumerates. The FTCA's text, context, and purpose all confirm that, under those circumstances, there is no bar to proceeding against the employee instead. To the contrary, that is the only legally viable option; precluding it would strip plaintiffs of *any* genuine opportunity to seek relief under *any* source of law.

I. First, *whatever* its scope, the judgment bar simply does not apply here. The plain text of § 2680 provides that all of the FTCA's other "provisions"—including its judgment bar—"shall not apply" to the set of claims carved out from the Act's sphere. Where, as here, a claim is dismissed on the basis of that statutory carve-out, § 2676 is thus inapplicable. Petitioners offer no coherent reading of the text that avoids this conclusion. Instead, they insist that this Court has previously departed from § 2680's plain meaning and that Congress could not have meant what it said. Neither is true. This Court must enforce Congress's clear direction that the judgment bar "shall not apply" to the claims wholly exempted from the Act.

II. By its own terms, too, the judgment bar is inapplicable. It is triggered only by a "judgment" in a suit "under section 1346(b)." But § 1346(b) does "not apply" to the claims enumerated in § 2680, and courts lack jurisdiction under § 1346(b) to adjudicate them. This means that the plaintiff's putative FTCA action was not "under" § 1346(b) in the first place. Moreover, a dismissal for lack of jurisdiction is not a "judgment" within the meaning of § 2676, as the bar's context amply confirms. The judgment bar supplements background *res judicata* principles, which protected the United States if a plaintiff sued its agents first but, in 1946, left servants exposed if a suit against their masters failed, even on the merits. Congress wrote the judgment bar to adopt a national rule allowing employees to equally benefit from the preclusive force of FTCA judgments. Given that context, "judgment" cannot include a jurisdictional dismissal, such as under § 2680, which carries no *res judicata* effect in the first place. In short, when a claim against the Government is dismissed because the court *has no power to adjudicate it*, that does not somehow shield the responsible federal employee.

III. Apart from ignoring the statute's text and its historical context and purpose, Petitioners' radically expansive understanding of the judgment bar would lead to absurd results—blocking *Bivens* suits even based on technical pleading defects such as filing in the wrong venue; encouraging personal-capacity suits; and arbitrarily depriving plaintiffs of relief to which they are legally, even constitutionally, entitled. For good reason, no Court of Appeals has adopted this unreasonably broad interpretation.

ARGUMENT

The FTCA's judgment bar is a sensible provision, serving intuitive ends. When plaintiffs have a choice of defendant, the bar prevents duplicative recoveries (if they sue the Government and win) and forbids second bites at the apple (if they sue the Government but lose on the merits). But the radically expansive construction of the bar pressed by Petitioners—that it is triggered by *any* dismissal, on *any* basis, of *any* tort claim against the Government, even if no such claim is even cognizable—is anything but sensible, and would yield absurd results. It cannot be squared with the statutory text or its purpose. That is why, tellingly, not one Court of Appeals has adopted that construction in the nearly seventy years since the law was enacted. This Court should not do so now.

I. UNDER THE PLAIN TEXT OF 28 U.S.C. § 2680, THE JUDGMENT BAR DOES "NOT APPLY" TO CLAIMS EXEMPTED FROM THE ACT.

Whatever the scope of the judgment bar itself, the provision is wholly inapplicable at the threshold. The FTCA states that its provisions "shall not apply" to the claims enumerated in § 2680. Those claims are thus carved out of the Act entirely. As such, if a claim asserted against the Government falls within a § 2680 exception, there is no waiver of immunity, no jurisdiction, no cause of action, no liability, and no relief—but also no bar to a non-FTCA claim, such as a constitutionally based *Bivens* suit against the employee. That plain reading makes good sense: If a claim is categorically carved out of the FTCA, injured parties should not be barred from pursuing *other* available forms of redress. And Petitioners have no way around § 2680's "shall not apply" language.

A. The Judgment Bar Does "Not Apply" To Claims Falling Within § 2680, And So Dismissals Under That Section Do Not Trigger The Judgment Bar.

There is no warrant, in this case, to explore the outer bounds of § 2676—the judgment bar itself—because another FTCA provision expressly provides that the judgment bar has no application here.

1. Specifically, § 2680 is entitled: "Exceptions." Its text provides that "[t]he provisions of this chapter and section 1346(b) of this title *shall not apply to*" over a dozen enumerated types of claims that are exempt altogether from operation of the Act. 28 U.S.C. § 2680 (emphasis added). The "chapter" to which § 2680 refers is chapter 171 of Title 28 of the Code. That chapter spans from § 2671 to § 2680—and includes § 2676, the judgment bar.

Thus, under the plain text of § 2680, these FTCA provisions "shall not apply to" any claim within the statutory carve-outs. And "shall" reflects "language of command." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Various consequences follow from this. Section 1346(b) does "not apply" to these claims, and so there is no subject-matter jurisdiction over them. Section 2672 does "not apply" to them, and so federal agencies are not authorized to compromise or settle them. Section 2673 does "not apply," and so claims falling within the exceptions need not be reported to Congress. Section 2674 does "not apply," and so the United States bears no tort liability for these claims. Section 2675 does "not apply," and so there is no duty to exhaust administrative remedies. Section 2678 does "not apply," and so neither the 25% maximum contingency fee nor its criminal penalty applies.

As relevant here, the crucial proposition is that § 2676 does "not apply" to § 2680 claims either. That means that a claim falling within one of the § 2680 exceptions does not trigger the judgment bar. That is, dismissal of such a claim (because it falls outside the scope of the FTCA) does not create any bar to a subsequent suit against the responsible employee, because the provision that generally imposes such a bar does "not apply" to the claim at issue.

The last time the scope of § 2676 was presented to this Court, Justices raised this point *sua sponte* at the oral argument. *See* Tr. of Oral Arg. at 11, *Will v. Hallock*, 546 U.S. 345 (2006) (No. 04-1332) ("Justice Stevens: ... [T]he introductory language of 2680 is that provisions of this chapter shall not apply to such cases. And is it not true that 2676 is in this chapter, and does it not, therefore, follow that 2676 does not apply to this case?"). As Justice Breyer observed, "the language does seem to say it." *Id.* at 15.

Indeed it does, directly and plainly. And as this Court has long emphasized, "time and again," courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, if statutory language has "a plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), the judicial inquiry "ceases," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "The plain meaning of legislation should be conclusive," certainly absent a compelling reason to believe that Congress intended something other than what it said. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

This Court recently applied those principles to identical "shall not apply" language in a related provision. *See Levin v. United States*, 133 S. Ct. 1224 (2013). That provision states that one of the § 2680 exceptions "shall not apply" to medical malpractice claims against certain federal personnel. *Id.* at 1227. This Court applied that language as written, allowing malpractice claims that would otherwise be barred by § 2680; it called the question "not difficult" in light of the law's "plain reading." *Id.* at 1232 & n.6. The analysis here is equally simple.

2. The plain text of § 2680 is "coherent and consistent" with the "statutory scheme." *Ron Pair*, 489 U.S. at 240, 242. If a claim exempted by § 2680 cannot be pursued against the Government, a plaintiff who nonetheless futilely asserts that claim against the Government should not be precluded from suing the *proper* defendant instead.

As this Court explained in *Will v. Hallock*, the judgment bar does not "reflec[t] a policy that [federal employees] should be scot free of any liability." 546 U.S. 345, 354 (2006). Rather, it is motivated by the same policy concern as *res judicata—viz.*, "avoiding duplicative litigation." *Id.* The FTCA subjected the *United States* to state tort liability, but did not eliminate any extant right to sue federal *employees* on the same theories. *See Westfall v. Erwin*, 484 U.S. 292 (1988).[1] The Act essentially gave plaintiffs

---

[1] The Westfall Act later did eliminate that right, which is why the judgment bar today precludes only *Bivens* suits. But *Bivens* had not yet been decided when the FTCA was enacted; Congress was focused on state-law tort suits. *See* Pet.Br.6.

a choice of defendant. But in doing so, it created a risk that plaintiffs would seek to recover twice, or take two bites at the apple. Congress addressed those risks in the judgment bar—and in the Act's parallel release bar, 28 U.S.C. § 2672, which bars claims by plaintiffs who accept federal *settlements*.

That core concern about "duplicative litigation," however, exists only if duplicative remedies exist. A plaintiff hurt in a car accident with a government driver, for example—the scenario "[u]ppermost in the collective mind of Congress," *Dalehite*, 346 U.S. at 28—should not recover twice, once from the United States and then again from the driver personally. *See Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 9 (1942) (statement of Francis Shea, Assistant Att'y Gen.) [hereinafter *1942 Hearing*] ("If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, ... he should not be able to turn around and sue the driver of the truck."). Nor, if that plaintiff loses his FTCA suit because, for example, the court finds that the driver was not negligent, should he be able to try an identical tort theory against the driver individually. Those are the classic objectives of the judgment bar.[2]

---

[2] One might have expected *res judicata* rules to address these problems. But as detailed below, the Restatement view at the time of the FTCA's enactment was that a servant could not invoke *res judicata* based on a judgment in favor of his master. The judgment bar filled that hole. *See infra* Part II.B.2.

Those concerns are not implicated when there *are no* duplicative causes of action. When a claim falls within the scope of § 2680, it is "carve[d] out" from the FTCA entirely. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 215 (2008). There is no cognizable cause of action against the Government. Thus, unlike the quintessential case of the plaintiff whose FTCA action fails because he cannot establish negligence, a § 2680 dismissal says nothing about the viability of any cause of action against the employee. The court is instead advising the plaintiff that he sued the *wrong party*. In that context, § 2680's "shall not apply" language sensibly withholds application of the judgment bar, allowing the plaintiff to proceed against the *correct* defendant. Such a plaintiff is not taking a second bite at the apple; he is trying an orange after being told that apples are out of season. *Cf. House v. Mullen*, 89 U.S. 42, 46 (1875) (if "bill is dismissed for misjoinder of parties," plaintiff "should be at liberty to bring another bill, with proper parties, in regard to the subject-matter of the first").

Put another way, a § 2680 dismissal implies only that no remedy exists against the United States under the FTCA. Far from *condemning* a tort claim against the responsible employee, that ruling is *irrelevant* to it. That lack of commonality—and absence of true duplication between alternative claims or defendants—was good reason for Congress to except § 2680 claims from the judgment bar.

Against all this, Petitioners argue that applying the judgment bar would advance federal interests by avoiding litigation costs. Pet.Br.23-28. Maybe so, but given the plain text of § 2680, Petitioners must show not that *applying* the judgment bar would be

rational, but that *exempting* § 2680 dismissals from the judgment bar would be *irrational*, such that the plain text so providing should be ignored. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (plain text must be enforced "where the disposition required by the text is not absurd"). Petitioners do not come close to making that demanding showing.

3. Here, of course, Himmelreich's claim falls within an exception under § 2680, and indeed his action against the United States was dismissed on that very basis. Pet.App.48a-53a. Accordingly, the judgment bar does "not apply" to that claim, and the dismissal of that claim cannot trigger the bar.

B. Petitioners Offer No Coherent, Plausible Alternative Construction Of The Text.

Petitioners offer no plausible interpretation of § 2680's "shall not apply" language that would preserve application of the judgment bar to claims like Respondent's. Instead, Petitioners argue that this language cannot mean what it says. Their arguments fail. Nothing in this Court's prior decisions or elsewhere in the FTCA undermines § 2680's express direction that the Act's provisions, including the judgment bar, "shall not apply" to the exempted claims.

1. Petitioners first cite *United States v. Smith*, 499 U.S. 160 (1991). *Smith* never addressed the "shall not apply" language of § 2680, but Petitioners argue that if § 2680 means what it says, that case's holding was wrong. Pet.Br.48-50. Their argument goes as follows: Under a provision enacted by the Westfall Act, the FTCA is the "exclusive" remedy "against the employee" for claims arising under state

law, and any other such action is "precluded." 28 U.S.C. § 2679(b)(1). *Smith* held that this provision bars state-law tort suits against the employee even for claims falling within § 2680. 499 U.S. at 166-67. Petitioners argue that this cannot be true if § 2680 really renders inapplicable all other provisions of the FTCA. If § 2680's "shall not apply" language means what it says, they argue, then the exclusive-remedy provision would not apply either, and state tort remedies would remain available for those claims—contrary to *Smith*'s holding.

The supposed conflict does not exist. Petitioners' argument ignores crucial historical and textual distinctions between § 2676 (the judgment bar) and § 2679(b) (the exclusive-remedy provision at issue in *Smith*). Those distinctions establish that there is no conflict between reading § 2679(b) to preclude all state-law tort claims against federal employees—including, as another provision of the Westfall Act expressly directs, those arising from conduct within § 2680's "exceptions"—while at the same time recognizing that § 2676 does "not apply" to *Bivens* claims arising from that conduct.

a. First, the Westfall Act and its exclusive-remedy provision were not enacted until forty years *after* § 2680, which originally stated that the provisions "*of this title*" "shall not apply" to the enumerated claims. Ch. 753, § 421, 60 Stat. 812, 845 (emphasis added). As Petitioners concede, "title" referred to Title IV of the Legislative Reorganization Act of 1946—the FTCA *as originally enacted*. Pet.Br.51; *see also* ch. 753, § 401, 60 Stat. at 842 ("This title may be cited as the 'Federal Tort Claims Act'.") That title included the judgment bar. Ch.

753, § 410(b), 60 Stat. at 844. But it did not include the exclusive-remedy provision—which was enacted decades later as part of an entirely different law, *see* Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988).

Accordingly, because the judgment bar *was* part of the original "title" that Congress directed in 1946 "shall not apply" to the exempt claims, that bar *does not* apply to claims falling within § 2680's scope. But since the § 2679(b) exclusive-remedy provision *was not* among the original provisions of the "title," that provision *does* apply to § 2680 claims. There is thus no conflict between *Smith* and the plain text of § 2680, as originally enacted.

It is true that, when the FTCA was later codified, some of its provisions were distributed to 28 U.S.C. § 1346(b), while others were sent to chapter 171 of Title 28. In the codified version of the Act, § 2680's language was therefore altered, to provide that the "*provisions of this chapter and section 1346(b) of this title*" shall not apply to the enumerated claims. And the Westfall Act's exclusive-remedy provision was later added to "this chapter," chapter 171 of Title 28. It is only by looking to that *codified* version of § 2680 that one encounters the supposed inconsistency Petitioners identify. Pet.Br.50.

This is hardly the first time that statutory cross-references have been muddled by later codification. Courts, however, have consistently adhered to the venerable rule that "the Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam). In one case, for example, Congress enacted a statute governing railroads "subject to part I of the Interstate Commerce Act"; the Code

translated that reference as those "subject to subchapter I of chapter 105 of title 49," based on the then-placement of the Interstate Commerce Act. *Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1074-76 (D.C. Cir. 1995). But some parts of that Act were later moved elsewhere, leading to a real practical difference between the two versions of the law. The D.C. Circuit held that the original Statutes at Large prevailed over the Code, thereby subjecting further railroads to regulation. *Id.* Similarly, in *Five Flags Pipe Line Co. v. Department of Transportation*, the court confronted a Code provision allowing direct appellate review of regulations promulgated "under this chapter," even though the original session law authorized such review only for regulations "under this Act." 854 F.2d 1438, 1440 (D.C. Cir. 1988). Again, the court followed the original text, not the Code. And because the regulation at issue had been promulgated under the "chapter" but not under the "Act," the court lacked jurisdiction. *Id.* at 1442.

Cheney and *Five Flags* involved provisions of the Code that had not been enacted into positive law, but courts apply a similar rule "even where," as here, "Congress has enacted a codification into positive law." *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). That is, courts do not assume that Congress intended such consolidation to effect any "changes of law or policy," unless that intent is "clearly expressed." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (interpreting Title 28). Indeed, when it enacted Title 28 of the Code into positive law, Congress expressly warned that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28 ... in

which any section is placed." Ch. 646, § 33, 62 Stat. 869, 991 (1948). So, while the exclusive-remedy provision is found in the "*chapter*" of Title 28 that the *Code* says does "not apply" to § 2680 claims, it is not in the "*title*" that the *Statutes at Large* say does "not apply." And because the latter governs in discerning Congress's intent, the "shall not apply" directive was simply irrelevant to the interpretation of § 2679(b) in *Smith*. Here, it is dispositive.

b. Beyond this historical distinction, Petitioners' argument ignores crucial *textual* differences between § 2676 and § 2679(b)—including the very language *Smith* relied on in holding that the latter reaches claims enumerated by § 2680.

As *Smith* reasoned, the express language of the Westfall Act's exclusive-remedy provision makes clear that the provision extends to claims arising from conduct within § 2680's exceptions. The Act provides that when the Attorney General certifies that a federal employee named as a defendant was acting in the scope of his employment, the United States shall be substituted as the defendant and the suit "shall proceed in the same manner" as any FTCA suit and "shall be *subject to the* limitations and *exceptions* applicable to those actions." 28 U.S.C. § 2679(d)(4) (emphasis added). The cited "exceptions" are those expressly "designated as such under § 2680." *Smith*, 499 U.S. at 166. The Westfall Act's legislative history confirmed this straightforward reading of the text, emphasizing that "any claim against the government that is precluded by the exceptions set forth in Section 2680 ... also is precluded against an employee." *Id.* at 167 n.9, 175 (quoting committee report). Thus, as *Smith*

concluded, "Congress recognized"—and, indeed, directly ordered—that its new provisions *would* govern suits falling within § 2680's "exceptions"—notwithstanding that section's longstanding "shall not apply" language. *Id.* at 166.

Congress was entitled to so provide. After all, a "later enactment governs" over an earlier one, *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring), and § 2679(d)(4)'s language leaves no doubt that Congress intended to apply § 2679(b) even to claims falling within § 2680's "exceptions." Insofar as there is any tension between that clear directive and § 2680's "shall not apply" command, it was incumbent upon this Court to look to the specific language of the *new* provisions for elucidation of legislative intent. That language squarely answered the question.

By contrast, there is *no* countervailing evidence from any other provision of the FTCA that Congress expected the judgment bar to be triggered by claims within § 2680's reach. Given the textual differences, Congress's intent for § 2679(b) to govern § 2680 claims in no way suggests that Congress meant for § 2676 to be triggered by § 2680 claims. The two inquiries are analytically distinct. And the text points in a different direction for each.

c. These historical and textual distinctions comport with Congress's distinct "fundamental purpose[s]" in enacting the FTCA and the Westfall Act respectively. *Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990). As explained, Congress enacted the FTCA to *expand* the avenues of relief available to persons injured by federal employees. *Supra* pp. 2, 14-16. By contrast, it

crafted the Westfall Act to *eliminate* a class of existing remedies, *see* Pub. L. No. 100-694, § 2(b), 102 Stat. at 4564 ("[i]t is the purpose of this Act to protect Federal employees from personal liability for common law torts"), with the important caveat that this narrowing of available remedies "does not extend or apply to" constitutionally based *Bivens* claims, 28 U.S.C. § 2679(b)(2); *see also supra* p. 4.

The Court's interpretation of the Westfall Act in *Smith* furthered that statute's employee-protecting purpose. Petitioners' argument here, by contrast, would thwart both the remedy-enhancing purposes of the original FTCA and the Westfall Act's specific intention to leave *Bivens* claims undisturbed. Nothing in *Smith* supports such a perverse result.

* * *

In short, and for these reasons, *Smith* did not *sub silentio* write "shall not apply" out of § 2680. Those words do not overcome manifest congressional intent as to application of the Westfall Act's later-enacted exclusive-remedy provision, but they directly foreclose application of § 2676 in cases like this.

2. Petitioners next argue that the "shall not apply" command of § 2680 cannot mean what it says because another section of the FTCA, one that was part of the original enactment and is now codified at 28 U.S.C. § 2679(a), was "understood to apply" to claims exempted by § 2680. Pet.Br.52. Actually, just the opposite is true, proving again that Congress meant exactly what it said.

Section 2679(a) provides that for any agency that is authorized "to sue and be sued in its own name," such authorization "shall not be construed" to allow

suit on claims "cognizable under section 1346(b)." In other words, for agencies whose sovereign immunity had been already waived by sue-and-be-sued clauses, Congress "limit[ed] the force" of those waivers, retracting them "in the context of suits for which [Congress] provided a cause of action under the FTCA." *Loeffler v. Frank*, 486 U.S. 549, 561-62 (1988). Therefore, "if a suit is 'cognizable' under § 1346(b), the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its own name,' despite the existence of a sue-and-be-sued clause." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

Contrary to Petitioners' theory, but consistent with § 2680's "shall not apply" instruction, § 2679(a) does *not* apply—and was *always understood* not to apply—to claims exempted by § 2680. The FTCA's retraction of agency sue-and-be-sued authorizations extends only to claims remediable under the FTCA—and not to claims carved out by § 2680. As such, agencies with sue-and-be-sued clauses *can indeed* be sued on the claims listed in § 2680, all else being equal—because those clauses waive immunity and § 2679(a) does not claw back those waivers.

Proving this point, some of the § 2680 exceptions categorically carve out from the FTCA *any* claims arising from the activities of certain federal agencies, such as the Tennessee Valley Authority ("TVA"), the Panama Canal Company, and certain federal banks. *See* 28 U.S.C. § 2680(l)-(n). Congress enacted those exceptions not to provide absolute immunity to those select agencies, but because "adequate remedies [we]re already available"—in direct suits under sue-and-be-sued clauses. H.R. Rep. No. 79-1287, at 6 (1945); S. Rep. No. 79-1400, at 33 (1946).

For example, the "principal reason" for the TVA exception was that the TVA "was susceptible to suit prior to the enactment of the [FTCA]," so the FTCA's remedy was "unnecessary" as to it; the TVA therefore "asked to be exempted." *Brewer v. Sheco Constr. Co.*, 327 F. Supp. 1017, 1018 (W.D. Ky. 1971); *see also* 92 Cong. Rec. 6563-64 (1946) (exception meant to ensure that "pending bill does not interfere with" existing "rights to file claims against" the TVA). Similarly, when Congress added a § 2680 exception for claims arising out of the activities of the Panama Railroad Company (as the Panama Canal Company was then known), *see* ch. 340, 63 Stat. 444 (1949), it did so because it wished to restore the Company's prior amenability "to suit on all claims, tort as well as contract, in the same manner as any private corporation." H.R. Rep. No. 81-830, at 2 (1949). Far from believing that § 2679(a) would apply to the newly excepted claims, Congress intended the § 2680 exception to preclude application of the sue-and-be-sued clawback to the Company. *See id.* at 2, 4 (letter from Secretary of Army explaining that one reason for this exception was to make inapplicable the § 2679 exclusive-remedy provision).

Consistent with that intent, courts—including this one—have uniformly held for decades that these entities *can* be sued in tort pursuant to their sue-and-be-sued clauses, even though the FTCA exempts the United States from liability for their acts. Thus, in *Gardner v. Panama Railroad Co.*, this Court read the exception for the Panama Railroad Company as allowing suit "directly against the company," as had been the case "before passage of the [FTCA]." 342 U.S. 29, 31-32 (1951) (per curiam). Congress did

not mean to "cut off, summarily," all tort remedies against the company. *Id.*, *accord De Scala v. Panama Canal Co.*, 222 F. Supp. 931, 934 (S.D.N.Y. 1963) ("Congress ... recognized that the Company had always been and continued to remain suable.").

As to the TVA, likewise, *Smith* observed that "[c]ourts have read" its sue-and-be-sued clause "as making the TVA liable to suit in tort," "independent of the FTCA." 499 U.S. at 168-69; *see also North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008); *Wayne v. TVA*, 730 F.2d 392, 397 (5th Cir. 1984); *Queen v. TVA*, 689 F.2d 80, 85 (6th Cir. 1982). And courts have reached the same result for the federal banks exempted by § 2680(n). *Sterrett v. Milk River Prod. Credit Ass'n*, 647 F. Supp. 299, 301-02 (D. Mont. 1986); *Tooke v. Miles City Prod. Credit Ass'n*, 763 P.2d 1111, 1113 (Mont. 1988).

All of this makes perfect sense if § 2680's "shall not apply" language is given its ordinary meaning: Because § 2679(a) does "not apply" to claims wholly exempt from the FTCA under § 2680, entities like TVA remain suable directly. Section 2679(a) does not make "exclusive" a *non-existent* FTCA remedy.

Yet on Petitioners' view, § 2679(a) withdraws the sue-and-be-sued clauses for torts against TVA and the Panama Canal Company—and, at the same time, § 2680 exempts their activities from FTCA remedies entirely. That makes nonsense of the scheme, leaving no tort remedies *at all* against these entities. It undermines clear legislative intent that these agencies *would* remain suable, and indeed that the § 2680 exceptions were appropriate precisely *because of* that exposure. And it contradicts all the caselaw above, including this Court's *Gardner* holding.

Against all of this, Petitioners invoke an ambiguous analysis in the legislative history (Pet.Br.52), in which Assistant Attorney General Shea described § 2679(a) as "plac[ing] torts of 'suable' agencies ... upon precisely the same footing as torts of 'nonsuable' agencies" and suggested that the FTCA exceptions would therefore apply to torts of suable agencies. *1942 Hearing*, *supra*, at 29. Of course, Petitioners' interpretation of this analysis is contradicted by the excepted agencies' continued amenability to suit, as discussed above. Moreover, in *Meyer*, this Court "reject[ed] this reading of the statute," holding that § 2679(a) does *not* preclude *Bivens* claims against agencies subject to sue-and-be-sued clauses, notwithstanding that this result "runs afoul of" Congress's purported desire to place all agencies on "the same footing." 510 U.S. at 478-79. Similarly, only suable agencies are subject to potential liability on claims exempted by § 2680, for which Congress likewise did not "provid[e] a cause of action under the FTCA." *Loeffler*, 486 U.S. at 562.[3]

---

[3] Of course, sue-and-be-sued agencies will not necessarily face *liability* for the claims exempted by § 2680. For example, an independent statute directs that all "tort claims arising out of activities of the Postal Service" are subject to the FTCA. 39 U.S.C. § 409(c). That provision—which would be redundant of § 2679(a) on Petitioners' reading—incorporates § 2680's exemptions, including for claims alleging negligent mail transmission, as to *all* tort claims against the Service. *See Davric Me. Corp. v. U.S. Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001) (applying § 409(c) to bar such a claim). Further, sue-and-be-sued clauses waive immunity, but do not answer the "analytically distinct" question whether there exists "an avenue for relief." *Meyer*, 510 U.S. at 484 (citing *United States v. Mitchell*, 463 U.S. 206, 218 (1983)). Finally, sue-and-be-sued

If anything, the interplay between § 2679(a) and § 2680 thus proves again that the latter's "shall not apply" instruction was no mistake.

3. Finally, Petitioners object that Congress could not have intended to exempt § 2680 claims from the FTCA's *definitional* provision or from other procedural rules included within the original "title" that § 2680 said "shall not apply" to its claims. Pet.Br.52. That is not persuasive.

As to the FTCA's definitional provision, *see* ch. 753, § 402, 60 Stat. at 842-43, the answer is simple. These are definitions of *statutory terms*. They do not apply or attach to "claims" at all, so there is nothing for § 2680 to render inapplicable. That is, § 2680 directs that the Act's provisions "shall not apply" to certain "claim[s]." But the definitions do not speak to "claims"; they speak to statutory terms.

As for the procedural provisions, it makes perfect sense that the rules for "counterclaim and set-off," for "interest upon judgments," and for "payment of judgments," *see* ch. 753, § 411, 60 Stat. at 844, would "not apply" to § 2680 claims, since courts do not even have *jurisdiction* over them. No set-offs, interest, or judgments to be paid would ever arise.

(continued...)

clauses do not strip common-law immunities, which protect against some of the claims exempted by § 2680. Pet.Br.27. For example, courts allow sue-and-be-sued agencies like the TVA to assert a common-law "discretionary function" immunity, even though § 2680(a)—which codified that rule for FTCA claims—does not itself apply. *Queen*, 689 F.2d at 85; *Brewer*, 327 F. Supp. at 1018-19; *Atchley v. TVA*, 69 F. Supp. 952, 955 & n.4 (N.D. Ala. 1947).

That leaves only the Act's special provision—no longer extant—for appeal, if all parties consented, to the Court of Claims instead of the Court of Appeals. Ch. 753, § 412, 60 Stat. at 844-45 (repealed 1982). Petitioners say "[t]here is no reason to believe" Congress meant to exempt § 2680 dismissals from that alternative route for appeal. Pet.Br.52. But Congress may have wanted a special role for the claims court in reviewing *liability* determinations, while leaving the circuit courts to review threshold determinations of the FTCA's inapplicability. *Cf. 1942 Hearing*, *supra*, at 17-23 (debating role of Court of Claims). In any event, it is hardly absurd to send § 2680 dismissals, like most district-court orders, to regional circuits for review. Petitioners' speculation about congressional intent in this limited respect is no basis for wholesale disregard of § 2680's text.

4. And wholesale disregard is what Petitioners seek. Their passing effort to construe § 2680's "shall not apply" language does not pass the laugh test.

The "better reading" of those words, Petitioners offer, is that *only* the FTCA's waiver of immunity and imposition of liability do "not apply" to § 2680 claims. Pet.Br.52. But Congress did not say there shall be *no liability* for the exempted claims, or *no jurisdiction* over them. "Had that been Congress's intention, it could easily have used the formulation just suggested." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). Congress broadly provided that the title *as a whole* "shall not apply" to these claims. On its face, that sweeps in the judgment bar. *See Levin*, 133 S. Ct. at 1232 (rejecting Government's "most unnatural" reading of "shall not apply" to mean "does apply").

The only "advantage" of Petitioners' reading is that it would shield § 2680 claims from application of all the FTCA provisions that *burden* the Government (*i.e.*, its immunity waiver and imposition of liability) while fully applying the FTCA provisions that *benefit* the Government (*i.e.*, the sue-and-be-sued clawback and judgment bar). Pet.Br.53. Indeed, Petitioners' "better reading" must have been gerrymandered to serve precisely that objective, as it has no grounding in the statutory text—and does not pretend to. This Court rejected that sort of self-serving "parsing" in *Meyer*, 510 U.S. at 479, and should do the same here.

* * *

Petitioners ask this Court to apply what they say is the judgment bar's plain text. But they ignore the plain text of § 2680, which directs that the judgment bar has no application to claims like Respondent's. By freeing plaintiffs to proceed against *legally viable* defendants when the United States has categorically disclaimed liability, that natural reading makes good sense and avoids absurd results. This Court should give effect to plain text *throughout* the FTCA.

II. Section 2676 Also Makes Clear That Section 2680 Dismissals Do Not Trigger The Judgment Bar.

Even looking only to the text of § 2676 itself, no judgment bar arises when a putative FTCA claim is dismissed under § 2680. *First*, Petitioners agree that the FTCA's jurisdictional provision, § 1346(b), does "not apply" to § 2680 claims and that § 2680 dismissals are jurisdictional in nature. It follows that a § 2680 dismissal is not a judgment in an action "under section 1346(b)," as § 2676 requires.

Second, § 2676 extends to federal employees the *res judicata* "bar" of an FTCA "judgment" for or against the United States—but it does not invest otherwise non-preclusive dismissals with dispositive force. Accordingly, a jurisdictional dismissal under § 2680, which lacks *any* claim-preclusive effect, is not a "judgment" entitled to the extended *res judicata* "bar" afforded by § 2676. *Third*, even if dismissals under § 2680 were *not* jurisdictional, they reflect defenses personal to the Government, and so would not preclude a claim against a federal employee under the *res judicata* principles that § 2676 incorporates. Petitioners' contrary theory ignores the Act's context, defies basic *res judicata* principles, and is hardly compelled by statutory text.

A. Jurisdictional Dismissals Do Not Count As Judgments In Actions "Under" The FTCA's Jurisdictional Provision.

When a court dismisses a tort claim against the United States based on a § 2680 exception, that is not a judgment in an action "under" the FTCA's jurisdictional provision, § 1346(b). Quite the contrary: Such a dismissal is a ruling that a claim *cannot* be adjudicated under § 1346(b). It therefore does not trigger the judgment bar.

1. There is no dispute here that the exceptions to FTCA liability found in § 2680 are jurisdictional in nature. Section 1346(b) is the FTCA's "jurisdictional provision." Pet.Br.3. Absent that provision, no court would have power to hear tort claims against the United States. Moreover, "[s]overeign immunity is jurisdictional in nature," *Meyer*, 510 U.S. at 475, and so jurisdiction in FTCA actions also depends on § 1346(b)'s limited waiver of sovereign immunity, *id.*

at 475-77. Yet § 2680 expressly says that § 1346(b) "*shall not apply*" to claims within its exceptions. As Petitioners accordingly agree, the § 2680 exceptions thus "limit the subject-matter jurisdiction of district courts." Pet.Br.4; *see also Dalehite*, 346 U.S. at 24.

This is not just semantics. There are significant differences between mere elements of a claim, on one hand, and crucial jurisdictional facts, on the other. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-14 (2006). Among other things, the fact that the § 2680 exceptions are jurisdictional means that they are not waivable, a procedural boon the Government takes full advantage of. *See, e.g., Bolduc v. United States*, 402 F.3d 50, 54, 60-62 (1st Cir. 2005) (addressing "belated" invocation of § 2680(a) for this reason).

The Seventh Circuit alone holds that § 2680's exceptions are mere affirmative defenses, rather than jurisdictional limits. *See Collins v. United States*, 564 F.3d 833, 837-38 (7th Cir. 2009). But Petitioners do not defend the Seventh Circuit's approach, and for good reason: Unlike the FTCA's limitations provision, which is not linked to § 1346(b) and which this Court accordingly held last Term is not jurisdictional, *see United States v. Wong*, 135 S. Ct. 1625, 1633 (2015), § 2680 is expressly tied to § 1346(b) and carves out "classes of cases" from courts' "adjudicatory authority," perfectly fitting this Court's paradigm of a "jurisdictional" limit, *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004).

Anyway, whatever the proper treatment of the § 2680 exceptions in general, the Government here obtained dismissal of Respondent's claim under Rule 12(b)(1), contending that the district court "lack[ed] subject matter jurisdiction." JA.115. The court

agreed. Pet.App.49a. There is therefore no doubt that the "judgment" supposedly triggering § 2676 was indeed a dismissal for lack of jurisdiction.

2. Section 2676 applies to judgments in actions "under section 1346(b)." "The word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("meaning ... of certain words or phrases may only become evident when placed in context"). Here, "the most natural reading" is that § 2676 is triggered only by judgment in a suit that is "subject to" § 1346(b), *Ardestani*, 502 U.S. at 135—*i.e.*, one that *actually falls within its jurisdictional scope.*

Again, the idea is that plaintiffs should have one "full and fair opportunity" to seek relief. *Montana v. United States*, 440 U.S. 147, 153 (1979). But if the court has no power to adjudicate the claim because it is not within the court's jurisdiction, then "the action was not properly brought *under* the [FTCA] in the first place." *Hallock v. Bonner*, 387 F.3d 147, 155 (2d Cir. 2004) (emphasis added), *vacated on other grounds*, *Will*, 546 U.S. 345. The putative FTCA action was not, as it turns out, actually "under" § 1346(b). Dismissal of such an action thus ought not, and does not, preclude a distinct cause of action against a distinct defendant. *Supra* pp. 14-16; *see also* Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 559 (1947) (contemporaneous scholarship agreeing with this reading of "under"); 3 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 16.13 (2015) (endorsing this interpretation).

Here, again, the "shall not apply" language of § 2680 is relevant, reinforcing this natural reading of "under." Petitioners concede that, whatever else, *§ 1346(b)* does "not apply" to § 2680 claims. Pet.Br.52. But if that is so, it follows that § 2680 claims are not brought "under" § 1346(b): An action dismissed because § 1346(b) does "not apply" is not an action "under section 1346(b)."

This Court has applied similar reasoning before, looking past the mere *label* of the action to ascertain whether it truly was under the applicable statute. In *Oklahoma Gas and Electric Co. v. Oklahoma Packing Co.*, for example, this Court confronted a provision that assigned constitutional claims to enjoin state officers to three-judge trial courts, with direct appeal to this Court over the final decree "in such suit." 292 U.S. 386, 390 (1934). Although the "allegations" in the case, "present[ed] on their face every prerequisite" required, this Court refused to hear the direct appeal: "[W]hen it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers, ... there was no longer any occasion for proceeding under" the provision at issue. *Id.* at 391. The Court thus looked to whether the claim *actually* implicated the jurisdictional grant, not just whether it so alleged.

Similarly, this Court's doctrine of "complete preemption" recognizes that even when a claim is pleaded under state law, it may "in reality" arise "under" federal law, thus allowing federal courts to exercise jurisdiction pursuant to 28 U.S.C. § 1331. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *accord Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

As these decisions show, a claim that on its face invokes a jurisdictional provision may not in fact trigger that provision or all of its consequences, *Okla. Gas*, 292 U.S. at 391, while a claim that facially disclaims a jurisdictional provision may yet trigger it, *Beneficial*, 539 U.S. at 8. Labels, in other words, do not always control. What matters is the context and the purpose of the jurisdictional provision.

By the same token, a putative tort claim against the Government is not "under" the FTCA simply by virtue of the plaintiff's attempt to invoke that statute. Rather, if it "bec[o]me[s] apparent ... that there was never any basis for relief" under that statute in the first place, *Okla. Gas*, 292 U.S. at 391—for example, because the jurisdictional provision does "not apply" to the claim—then that claim should not treated as one "under" § 1346(b). That is the best reading of § 2676, in view of its context and purpose.

3. Petitioners respond that this construction of "under" is foreclosed by the Court's decision in *Meyer*. Pet.Br.45-48. But *Meyer* is doubly irrelevant.

At the outset, *Meyer* construed a different word: whether a claim is "cognizable" under § 1346(b), *see* 510 U.S. at 476, not whether an action is "under" § 1346(b). While Petitioners suggest that these two terms are interchangeable, this Court "refrain[s] from concluding" that "differing language" in "two subsections" of one statute "has the same meaning in each." *Russello v. United States*, 464 U.S. 16, 23 (1983). And there is an obvious difference between the two words: "Cognizable" is language of *capability*. *See Meyer*, 510 U.S. at 476 (quoting definition of cognizable as "*capable* of being tried or examined before a designated tribunal" (emphasis added)).

Cognizability may thus turn exclusively on whether the claim "alleges" the "elements" of § 1346(b). *Id.* at 476-77. But "under" is language of *reality*, making it appropriate to consider whether the action turns out to *actually* implicate § 1346(b) jurisdiction.

Moreover, Petitioners' premise is false: *Meyer* did *not* hold that a claim exempted by § 2680 is still "cognizable" under § 1346(b). The claim in *Meyer* was not a § 2680 claim at all, and this Court never addressed § 2680 (beyond in an unrelated footnote). *See id.* at 474, 478 n.6. Rather, this Court held that a *Bivens* claim is not "cognizable" under § 1346(b) because it does not "alleg[e] the six elements" of that jurisdictional hook. *Id.* at 477. The Court thus had no occasion to speak to whether a claim that alleged those necessary elements but also fell within one of the § 2680 exceptions to which § 1346(b) does "not apply" would qualify as "cognizable" under § 1346(b) (much less whether its dismissal would constitute a judgment in an action "under" § 1346(b)).

Petitioners emphasize a footnote in *Meyer* that clarified that the proper inquiry is whether a claim is "cognizable" under § 1346(b), "not whether a claim is cognizable under the FTCA generally." *Id.* at 477 n.5 (emphasis omitted). But that banal observation, which corrected imprecise language in a prior case, *Loeffler*, 486 U.S. at 562, likewise does not suggest that claims exempted by § 2680 are cognizable under § 1346(b). Because of § 2680, *§ 1346(b) does not apply* to the exempted claims. Thus, it is perfectly fair to say that such a claim is not "cognizable" under § 1346(b)—and, *a fortiori*, that its dismissal is not a judgment "under" § 1346(b).

4. Straying further afield, Petitioners again cite *Smith*, this time to argue that its construction of § 2679(b) forecloses Respondent's reading of "action under [§]1346(b)" in § 2676. *See* Pet.Br.48-50.

The simple answer is that the two provisions are not remotely similar in text or purpose. Indeed, this Court in *Meyer* rejected the same Government-pressed analogy, calling *Smith* "unhelpful": After all, the Court "had no occasion in *Smith* to address the meaning of the term 'cognizable' because § 2679(b)(1) does not contain the term." *Meyer*, 510 U.S. at 478 n.6. Nor does § 2679(b)(1) contain the term "under"; *Smith* is thus equally "unhelpful" here. *Id.* Further, as already explained, the result in *Smith* was plainly dictated by other provisions in the Westfall Act, to which there is no analogue here. *Supra* Part I.B.1.

B. Jurisdictional Dismissals Are Not "Judgments" Under Section 2676.

Jurisdictional dismissals, such as under § 2680, do not trigger the judgment bar for a second reason as well. In light of the judgment bar's history and context, dismissals that lack claim-preclusive effect, like those for lack of jurisdiction, do not constitute "judgments" within the meaning of § 2676.

1. "Judgment" is a term with many definitions. Sometimes it means *any* determination by a court. Pet.Br.18-20. Sometimes it means *appealable* orders as in Federal Rule of Civil Procedure 54. Pet.Br.21. But there are narrower definitions, too. Specifically, when the FTCA was enacted, one accepted definition required, as a prerequisite to a "judgment," that the issuing court possess jurisdiction over the matters adjudicated. *See, e.g.*, *Black's Law Dictionary* (3d ed.

1933) (defining "judgment" as "[t]he final determination, *by a court of competent jurisdiction*, of the rights of the parties in an action or proceeding" (emphasis added)); 1 Abraham Clark Freeman, *A Treatise on the Law of Judgments* 4 (Edward W. Tuttle ed., 5th ed. 1925) (offering, as one definition of judgment, "the final consideration and determination *of a court of competent jurisdiction* upon the matters submitted to it" (emphasis added)).

If Congress intended the latter definition in § 2676, then the judgment bar is not triggered by a jurisdictional dismissal of a putative FTCA action, such as under § 2680. Such a dismissal is not a "judgment" adjudicating an FTCA claim, merely acknowledgement of the court's lack of authority to adjudicate the claim at all.

The question here is which definition Congress meant. Contrary to Petitioners' suggestion, courts at the time of the FTCA's enactment did not answer the question. Petitioners cite many decisions describing dismissals of FTCA claims—even jurisdictional ones, or dismissals under § 2680—as "judgments." Pet.Br. 20 & n.6. But those courts were not construing the judgment bar, or analyzing how Congress intended the term in that provision. Again, the question is not whether a jurisdictional dismissal *could be* described as a "judgment," but whether *Congress intended* the term "judgment" in § 2676 to include such orders.

Nor is the question resolved by the FTCA's use of the word "judgment" in other provisions. Petitioners point to § 412 of the original Act, which provided that final FTCA "judgments" "shall be subject to review by appeal" as specified there, and note that Congress presumably intended the same appellate review for

jurisdictional dismissals. Pet.Br.22. Even if so, *but see supra* p. 29, *other* uses of "judgment" in the Act point the opposite direction. For example, one section of the Act provides that the United States "shall not be liable for interest prior to judgment." 28 U.S.C. § 2674. In that context, Congress is referring to money judgments *against* the United States; there would never be potential liability for "interest" prior to a *dismissal*. Other FTCA provisions likewise use "judgment" to refer to an award against the United States. *See* 28 U.S.C. § 2672 (directing settlements to "be paid in a manner similar to judgments ... in like causes"); *id.* § 2678 (prohibiting attorneys' fees in excess of 25% of "any judgment rendered pursuant to section 1346(b)").[4]

In short, there are and always have been many meanings of "judgment." Which one Congress meant in § 2676 calls for analysis of that provision's context. *See Brown & Williamson*, 529 U.S. at 132 ("meaning

---

[4] Indeed, the legislative history suggests that Congress understood the word "judgment" *in § 2676 itself* to refer to a money judgment against the Government. A Senate Report discussed how "[j]udgments" triggering the judgment bar "are to be paid." S. Rep. No. 77-1196, at 6 (1942) ("Judgments, which will bar further action upon the same claim against the negligent employee as well as the Government, are to be paid in the same manner as judgments rendered upon contract claims under the Tucker Act ...."). This Court, too, in one its earliest FTCA cases, said that the "one respect" in which the FTCA "touch[es] the liability of employees" is that § 2676 "makes the judgment *against the United States* 'a complete bar' to any action by the claimant against the employee." *Gilman*, 347 U.S. at 509 (emphasis added). That construction would also resolve this case against Petitioners.

... of certain words or phrases may only become evident when placed in context"); *cf. Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality op.) (cataloging cases ascribing different meaning to "identical language" in different statutes and "different provisions of the same statute").

2. The "context" of the judgment bar is *res judicata* and claim preclusion. Those background principles, against which § 2676 was enacted, confirm that no bar arises from mere jurisdictional dismissals, which carry no preclusive effect as a general rule. They are not, in other words, "judgments" within the meaning of § 2676.

a. As *Will* recognized, the closest "analogy to the judgment bar" is "claim preclusion, or *res judicata*," because the judgment bar "functions in much the same way" and was motivated by the same "concern"—namely, "avoiding duplicative litigation." 546 U.S. at 354. Confirming its intent to incorporate principles of claim preclusion into § 2676, Congress tellingly used the traditional *res judicata* language of a "bar" to suit. *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) ("[c]laim preclusion describes the rules formerly known as 'merger' and 'bar'").

To be sure, there would have been no need for the judgment bar if all it did was *apply* principles of claim preclusion to FTCA judgments. *Res judicata* already applies to federal judgments, as a matter of federal common law. *Id.* at 891. Section 2676 must therefore extend beyond traditional preclusion rules, at least as those rules were understood at the time of the FTCA's enactment. *Cf. Will*, 546 U.S. at 354 (recognizing that § 2676 is "arguably broader than traditional *res judicata*").

And it does—in a very clear way. Specifically, when Congress enacted the FTCA, a judgment in favor of a *federal employee* in a personal-capacity suit would, under then-prevailing ordinary preclusion rules, have barred a subsequent *respondeat superior* claim against *the Government*. *See Restatement of Judgments* § 99 (1942) ("valid judgment on the merits ... in favor of a person charged with the commission of a tort ... bars a subsequent action ... against another responsible for the conduct of such person"); *see also id.* § 96(1)(a) & cmts. b, d (same rule in master-servant scenario if servant sued first); *Roadway Express, Inc. v. McBroom*, 6 S.E.2d 460, 462 (Ga. Ct. App. 1939) ("a judgment on the merits in favor of the agent or servant ... is res judicata in favor of the principal or master"). There being no dispute on that score, there was no need for Congress to provide that a judgment in an action against an employee would bar a subsequent FTCA suit.

By contrast, if a plaintiff asserted *respondeat superior* liability against the employer *first*, the 1942 Restatement took the view that the plaintiff, if unsuccessful, *could* sue the employee—because of a lack of "mutuality" between defendants. *Restatement of Judgments* § 96(2) cmt. j ("[w]here an action is brought first against the one secondarily liable there is ordinarily no reason for an exception to the ordinary rules of mutuality and hence ... there is ordinarily no reason for binding the unsuccessful claimant"); *see also Myers' Admn'x v. Brown*, 61 S.W.2d 1052, 1053-54 (Ky. Ct. App. 1933) (answering no to question "whether a judgment in favor of a master or principal in a suit brought for the alleged negligence of the servant or agent ... inures to the

benefit of that servant or agent when later sued by the same plaintiff for the same negligence"); *Gilmer v. Porterfield*, 212 S.E.2d 842, 844 (Ga. 1975) ("Although a master has privity with his servant and can claim the benefit of an adjudication in favor of the servant, a servant is not in privity with the master so as to be able to claim the benefit of an adjudication in favor of the master."); *McVeigh v. McGurren*, 117 F.2d 672, 678 (7th Cir. 1940) ("a judgment against the principal is not binding or conclusive on an agent who is not a party").

Not all courts agreed. Some rejected the Restatement view, holding that a judgment in favor of a master "is a bar" to a subsequent suit against the servant. *E.g.*, *Wolf v. Kenyon*, 273 N.Y.S. 170, 173 (App. Div. 1934); *Jones v. Valisi*, 18 A.2d 179, 181 (Vt. 1941). The state of this mutuality law when the FTCA was enacted was thus unclear. Accordingly, Congress spoke to the question directly. Embracing the more relaxed approach to mutuality, Congress adopted a uniform federal rule that the judgment in an FTCA suit should be given preclusive effect in—*i.e.*, in the language of *res judicata*, should "bar"—a subsequent suit against the employee.

Congress and the Executive Branch understood that the purpose of the judgment bar was to ensure symmetry in *res judicata* treatment of tort claims against the Government and its employees. Testifying to Congress about the differences between the bill that became the FTCA and a prior version that lacked a judgment bar, Assistant Attorney General Shea explained that the judgment bar meant that a "[j]udgment in a tort action constitutes a bar to further action upon the same claim, *not only*

against the Government (as would have been true under [the prior version]) *but also against the delinquent employee.*" *1942 Hearing*, *supra*, at 27 (emphasis added); *see also* S. Rep. No. 77-1196, at 6 (1942) (judgments "will bar further action upon the same claim against the negligent employee as well as against the Government"). Notably, like the enacted FTCA, the referenced prior version of the bill contained no express provision barring further action upon the same claim against the Government. *See* H.R. 5373, 77th Cong. (1941). It was understood that such a bar arose from—and was defined by—the the common law of *res judicata*.[5]

Both modern scholarship and contemporaneous analysis agree that Congress enacted the judgment bar against the common-law backdrop of *res judicata*, to create a uniform symmetrical rule of preclusion for tort claims against the Government and its employees. *See* James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 427-45 (2011); Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949) (bar "extends" the "common law rules of *res judicata*" to benefit employees). Indeed, only that reading of § 2676 explains its unidirectionality—its operation in favor of employees but not the Government itself.

---

[5] The parallel wording of the FTCA provision protecting employees from lawsuits following acceptance of a *settlement* from the Government, *see* 28 U.S.C. § 2672; *supra* p. 15, is further evidence of Congress's focus on common-law principles of *res judicata* and mutuality.

b. Given that context, "judgment" as it is used in § 2676 cannot be understood as including jurisdictional dismissals. Those dismissals have no *res judicata* effect in the first place. Yet § 2676's object was to *extend* the claim-preclusive effect of FTCA judgments by relaxing the mutuality doctrine. It was not meant to *grant* preclusive effect to judgments that never would have had preclusive force *even in favor of the original defendant*.

It is black-letter law that dismissals for lack of jurisdiction do not carry claim-preclusive effect: not when the FTCA was enacted, and not today either. *Restatement of Judgments* § 49 & cmt. a (1942) (no claim-preclusive effect for dismissal "based on the lack of jurisdiction"); *Restatement (Second) of Judgments* § 20(1)(a) (1982) (no bar to "another action" when "judgment is one of dismissal for lack of jurisdiction"); *Hughes v. United States*, 71 U.S. 232, 237 (1866) (where "first suit was dismissed for ... want of jurisdiction," dismissal "will prove no bar to another suit"); *Swift v. McPherson*, 232 U.S. 51, 55-56 (1914). "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *Mayor v. Cooper*, 73 U.S. 247, 250 (1867).

In light of this background rule, a jurisdictional dismissal is not a "judgment" within the meaning of § 2676, as contemporaneous commentators agreed. *See* Note, *supra*, at 559 & n.170 (judgment bar "should not be interpreted as referring to any judgment by which the court denies its jurisdiction," which "cannot be res judicata of the issues involved in the action"). A jurisdictional dismissal would not even preclude suit against the *original defendant* based on the same events, so why would it preclude

suing a *non-party*? In other words, Petitioners' reading would, oddly, afford certain dismissals more potent preclusive effect in favor of non-parties than in favor of the United States. That cannot be right. *See also infra* Part III (detailing these and other absurdities of Petitioners' construction).

In short, if the judgment in an FTCA action would allow the Government to preempt a second suit, then it also allows federal employees to invoke *res judicata* principles if *they* are sued instead. But if the original dismissal would not even allow the Government to shut down a second suit, then such a dismissal does not count as a "judgment" that bars suit against the responsible employee either. Simply put, such a "judgment" has no claim-preclusive effect for § 2676 to extend to the benefit of the employee. It therefore does not constitute a "judgment" within the meaning of § 2676.

3. Looking to *res judicata* background rules to inform ambiguous statutes is a course this Court has taken before. The Anti-Injunction Act generally forbids federal-court injunctions against litigation in state courts. *See* 28 U.S.C. § 2283. But an exception, enacted just two years after the FTCA, allows such injunctions when necessary to "protect or effectuate" the "judgments" of a federal court. *Id.* Construing that exception, this Court has recognized that it is "founded in the well-recognized concepts of *res judicata* and collateral estoppel," and utilized those concepts to inform its "proper scope." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). The same goes for the FTCA judgment bar, which uses the same crucial, ambiguous word: "judgment."

Indeed, *Chick Kam Choo* shows why Petitioners' broad reading of the judgment bar is wrong. In that case, a federal court dismissed claims arising from events in Singapore, invoking *forum non conveniens* in favor of a suit in that country. *Id.* at 142-43. The plaintiffs, however, refiled in *state* court. *Id.* The question was whether the state-court suit could be enjoined to effectuate the federal "judgment" of dismissal. *Id.* at 144-45. Consistent with preclusion principles, this Court said no: The federal court had not "resolve[d] the merits" of the claims, and state courts may "consider themselves an appropriate forum," even if federal courts did not. *Id.* at 148.

Similarly, a jurisdictional dismissal of an FTCA action against the United States is not a "judgment" that should bar a claim against a federal employee. Like a dismissal based on *forum non conveniens*, it does not resolve the merits of the underlying tort claim, and the employee may be a viable defendant even if the Government is not.

4. Petitioners agree that § 2680 dismissals are jurisdictional, but nonetheless claim that they carry *res judicata* effect and should trigger the judgment bar. Their arguments are wrong.

a. Petitioners claim that, whatever the general rule for jurisdictional dismissals, § 2680 dismissals reflect substantive policy judgments as to the scope of liability and thus constitute decisions "on the merits" carrying claim-preclusive effect. Pet.Br.33-38. This argument is doubly flawed.

At the outset, Petitioners misunderstand the meaning of "on the merits." As this Court has noted, that phrase was historically used as a shorthand

description of the type of judgment "entitled to claim-preclusive effect." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502-03 (2001). But "over the years," the phrase's meaning changed, and it is now "no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect." *Id.* "That is why the Restatement of Judgments has abandoned the use of the term ['on the merits']—'because of its possibly misleading connotations.'" *Id.* at 503 (quoting *Restatement (Second) of Judgments* § 19, cmt. a). The dichotomy, rather, is between judgments entitled to claim-preclusive effect and those that are not. *See id.*[6]

Accordingly, whether § 2680 dismissals can be characterized as "substantive" in some sense—such as in unrelated contexts like retroactivity doctrine, *see* Pet.Br.39—is irrelevant. Either way, they are dismissals *for lack of jurisdiction*, because the court simply has no power to adjudicate the claim. *Accord* Pet.Br.4. Under *res judicata* principles, they are therefore *not* entitled to claim-preclusive effect. *See Semtek*, 531 U.S. at 502. And that is why they do not trigger the judgment bar, which merely extends to employees the existing *res judicata* effects of FTCA judgments.

---

[6] Many courts, of course, continue to refer to a judgment "on the merits" as a prerequisite for claim preclusion, when they mean, more precisely—albeit less descriptively—that there must be a type of judgment entitled to claim-preclusive effect. *Semtek*, 531 U.S. at 502. That is surely how the Sixth Circuit intended the phrase, when it explained that § 2676 is triggered only by a judgment "on the merits," Pet.App.8a, as opposed to one for "lack of subject-matter jurisdiction," Pet.App.6a.

Anyway, even if "on the merits" were the proper standard, a § 2680 dismissal is not "on the merits" in the relevant sense of "pass[ing] upon the substantive merits of [the] claim." *Semtek*, 531 U.S. at 502. Yes, § 2680 reflects policy judgments about when the United States should waive its sovereign immunity. Pet.Br.34. But, at the same time, it does not reflect any judgment about the substantive tort claim under state law. Indeed, the § 2680 exceptions apply *despite* the existence of a viable state-law tort claim. Section 2680 relates to the availability of a *remedy against the United States*, but says nothing about the underlying substantive *right* under state law.

In that sense, a § 2680 dismissal is analogous to a statute-of-limitations dismissal, which historically "merely bars the remedy and does not extinguish the substantive right"—and therefore traditionally lacks claim-preclusive effect. *Semtek*, 531 U.S. at 504. So just as a plaintiff whose first suit was time-barred could still sue in another jurisdiction, *id.*, a plaintiff who has no remedy *against the Government* under § 2680 could still sue *the responsible employee* under state tort law or otherwise.[7]

---

[7] For this reason, then-Judge Breyer's opinion in *Rose v. Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), hurts rather than helps Petitioners. That court acknowledged that jurisdictional dismissals lack claim-preclusive effect, but held that the statute of limitations applied by the state court in that case was not truly jurisdictional. *See id.* at 79-80. Among other things, that particular limitations bar—unlike most—*did* extinguish the "right," not merely the "remedy." *Id.* at 80-81. But § 2680 speaks only to the *remedy* against the United States.

b. Petitioners also insist that, while jurisdictional dismissals generally lack *res judicata* effect, there is a different rule for such dismissals if based on sovereign immunity. *See* Pet.Br.38 & n.18.

Again, Petitioners conflate two distinct concepts. *State* sovereign immunity, as a matter of *state law*, may well be an affirmative defense that does not deprive *state* courts of jurisdiction. Thus, for example, the first case Petitioners cite on this point, *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 & n.3 (5th Cir. 1984), relies on a Texas case holding "sovereign immunity" to be an "affirmative defense," *Herring v. Tex. Dep't of Corrs.*, 500 S.W.2d 718, 719-20 (Tex. Civ. App. 1973). Similarly, in *Kutzik v. Young*, 730 F.2d 149, 151 (4th Cir. 1984), the court relied on Maryland's treatment of state sovereign immunity as a "legal defense," not a "jurisdictional" flaw, *Annapolis Urban Renewal Auth. v. Interlink, Inc.*, 405 A.2d 313, 318 (Md. Ct. Spec. App. 1979). *Accord Beaver v. Bridwell*, 598 F Supp. 90, 93 (D. Md. 1984).

The sovereign immunity of the *United States*, however, as a matter of *federal law*, is decidedly a jurisdictional limit on the *federal* courts. *Meyer*, 510 U.S. at 475. Petitioners do not claim otherwise. A dismissal on that basis, such as pursuant to a § 2680 exception, thus has "no *res judicata* effect." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

c. Finally, Petitioners observe that even jurisdictional dismissals have *issue-preclusive* effect as to the findings underlying the dismissal. Pet.Br. 39-40. That is true, but irrelevant.

Issue preclusion, traditionally called collateral estoppel, "foreclos[es] relitigation of a matter that has been litigated and decided." *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 77 n.1 (1984). That includes jurisdictional determinations. But the relevant doctrine here is *claim preclusion*, usually called *res judicata*, which "foreclos[es] litigation of a matter that never has been litigated." *Id.* After all, an employee invoking the judgment bar to shut down a *Bivens* suit does not claim the latter is barred by any factual or legal finding that triggered dismissal of the FTCA action under § 2680. Petititioners do not assert that Respondent's *Bivens* suit is somehow foreclosed because they exercised a "discretionary function." Pet.App.53a. Rather, they argue that the *Bivens* claim arises from the same events as the FTCA action did, and so dismissal of the latter bars the former. That is an effort to invoke the judgment bar as an analogy to claim preclusion. But because jurisdictional dismissals lack claim-preclusive effect, § 2676 cannot extend that effect to favor employees.

To be clear: Section 2676's "bar" filled a hole in the law of *claim preclusion*, *i.e.*, "merger and bar," so employees could invoke the claim-preclusive force of FTCA dismissals. But jurisdictional dismissals carry no claim-preclusive effect in the first place; such dismissals should not be regarded as "judgments" within that provision's meaning. Petitioners' retort that jurisdictional dismissals carry some limited *issue-preclusive* effect is therefore beside the point.

In short, Petitioners *do not* deny that § 2680 is jurisdictional, and *cannot deny* that jurisdictional dismissals are not *res judicata*. A § 2680 dismissal is thus not a "judgment" triggering the § 2676 "bar."

C. Section 2680 Dismissals Do Not Trigger The Judgment Bar Since They Rest On Defenses Personal To The Government.

Because all parties agree that § 2680 sets forth jurisdictional exceptions, the Court should so assume in resolving this case. But even if a § 2680 dismissal were not jurisdictional, it still would not be a "judgment" triggering the § 2676 "bar." Section 2680 reflects a decision by the United States not to accept *respondeat superior* liability for certain types of claims. These are thus defenses personal to the Government, with no application to suits against employees. Under the *res judicata* principles reflected by the judgment bar, dismissals on such personal defenses cannot be invoked to bar suits against non-parties, even when mutuality is *not* a barrier. So just as dismissal of a claim against an employee based on a defense unique to him would not "bar" suit against his employer, dismissal of an FTCA suit under § 2680 does not trigger the judgment "bar" to preclude a *Bivens* suit.

The 1942 Restatement explained that for a "judgment on the merits" in favor of a servant to "bar a subsequent action" against "another responsible for the conduct of such person" (*e.g.*, his employer), that judgment could "not [be] based on a personal defense." *Restatement of Judgments* § 99; *see also id.* § 96. That is, to have preclusive effect, the judgment could not rest on a defense only available to the servant, such as a "personal immunity." *Id.* § 96 cmt. g. States that did not follow the Restatement's asymmetrical preclusion rule likewise held that judgments in favor of a *master* based "on some personal defense" would not bar subsequent suits

against the *servant*. *E.g.*, *Griffin v. Bozeman*, 173 So. 857, 859-60 (Ala. 1937). Thus, if an employer were exonerated for his employee's acts "in consequence of a finding that the employee acted beyond the scope of his employment, the judgment would not merit conclusiveness" in a suit against the employee. *Lober v. Moore*, 417 F.2d 714, 718 n.31 (D.C. Cir. 1969); *Tighe v. Skillings*, 9 N.E.2d 532, 534 (Mass. 1937).[8] The same rule governs today: Judgments resting on personal defenses do not trigger *res judicata* in the principal-agent context. *See Restatement (Second) of Judgments* § 51(1)(b) & cmt. c (1982) (no preclusion in second action if "judgment in the first action was based on a defense that was personal to the defendant"); *Burdette v. Carrier Corp.*, 71 Cal. Rptr. 3d 185, 197-98 (Ct. App. 2008).

The "bar" created by § 2676 incorporates that same rule. It extends to employees the preclusive force of FTCA judgments, rejecting the asymmetrical Restatement rule. But it does not wipe away the other conditions for *res judicata*. Thus, just as the United States cannot avail itself of a judgment in favor of an employee on a personal defense, employees cannot avail themselves of judgments in favor of the Government on its personal defenses. And the § 2680 exceptions are quintessentially

---

[8] *See also Whitehurst v. Elks*, 192 S.E. 850, 851 (N.C. 1937) ("Where the relation between two parties is analogous to that of principal and agent, ... the rule is that a judgment in favor of either, in an action brought by a third party, *rendered upon a ground equally applicable to both*, should be accepted as conclusive against plaintiff's right of action against the other." (emphasis added)).

personal. Like an assertion that an employee acted outside the scope of employment, these exceptions can only be "taken advantage of" by the Government. *Restatement of Judgments* § 96 cmt. g. Because the exceptions "would not apply to an action against [an employee]," dismissal on these grounds "does not bar [a] subsequent action against" the employee. *Id.*

In sum, in extending the *res judicata* effect of FTCA judgments to preclude subsequent litigation against federal employees, the judgment bar did not override the background common-law rule that personal-defense dismissals carry no preclusive effect. There is no reason to believe that Congress sought, in this respect, to afford *greater* protection to federal employees than to the United States itself.

* * *

When a court dismisses a putative FTCA action under § 2680, that is neither a dismissal of an action "under" the FTCA's jurisdictional hook nor a "judgment" that acts as a "bar" under *res judicata* principles. Such a dismissal thus does not have the counterintuitive consequence of barring the plaintiff from invoking the only remedy actually available.

III. PETITIONERS' EXPANSIVE READING OF THE JUDGMENT BAR WOULD LEAD TO ABSURD RESULTS.

Petitioners urge this Court to hold that § 2676 is triggered by *any* dismissal, on *any* ground, of *any* tort claim against the Government. That unyielding position—which no Circuit has embraced since the FTCA's 1946 enactment—has to be wrong. It would cause a host of absurdities, *undermining* Congress's objectives in enacting the landmark statute.

First, Petitioners' wooden reading leads to absurd results. They claim that the "plain meaning" of § 2676 does not limit its scope, and so any "entry of a 'judgment'" in a suit invoking the FTCA precludes subsequent *Bivens* actions. Pet.Br.12, 17. On that construction, if a plaintiff erroneously filed his FTCA suit in the *Southern* District of Ohio instead of the *Northern* District, leading to dismissal without prejudice for improper venue, he could refile that suit—but would be precluded from filing a *Bivens* action. Or, if the FTCA action were dismissed because the employee was not acting within the scope of employment—a holding that means the employee himself ought to be "personally answerable," *Gutierrez de Martinez*, 515 U.S. at 423—a suit against the employee would, paradoxically, be *precluded*. That makes no sense, as noted by both early and modern commentators. *See* Reginald Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167, 176 (1952) (judgment bar "obviously" does not apply there); Jayson & Longstreth, *supra*, § 16.13 (noting how Petitioners' reading "produc[es] absurd results").

Second, the practical consequence of that broad reading is that injured parties would have every incentive to sue the employee *first*—to avoid the risk of a jurisdictional FTCA dismissal extinguishing the *Bivens* action. Section 2676, after all, precludes only the *latter* based on the *former*, not vice versa. But one of the Act's principal objects was to offer relief from the deep-pocketed Government to *discourage* personal-capacity suits, which "attack ... the morale of the services." *Gilman*, 347 U.S. at 511 n.2. Petitioners' construction would do the *opposite*.

Finally, if injured parties did *not* sue the employee first, Petitioners' reading would deprive them of any opportunity to remedy their injuries—even if they are otherwise entitled to relief from *someone* as a matter of both fact and law. It may well be that § 2680 bars relief *from the Government*. But that hardly implies that the employee has complied with the Constitution. To the contrary, it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980). That is why Congress expressly exempted *Bivens* claims from the Westfall Act's exclusive-remedy provision. Yet, on Petitioners' view, a judicial decision finding the FTCA *inapplicable*—even if § 2680's applicability presented a close legal question, and the plaintiff's claim was colorable—would be a death knell for the "parallel" *Bivens* remedy. Nothing in the FTCA's purposes or history supports that strange result. *See id.* at 18-19 (*Bivens* suit precluded only if "Congress has provided an alternative remedy which it explicitly declared to be a substitute"). The Act was not meant to minimize litigation at all costs, but to give plaintiffs a choice of two remedies. If one of those remedies is categorically unavailable, that is *all the more reason* to permit the other.

CONCLUSION

This Court should affirm the judgment below.

FEBRUARY 2016

Respectfully submitted,

CHRISTIAN G. VERGONIS
Counsel of Record
YAAKOV M. ROTH
DAVID T. RAIMER
JORDAN VON BOKERN
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
cvergonis@jonesday.com

Counsel for Respondent